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# First Amendment Protection for Political Candidacy of Public Employees

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# FIRST AMENDMENT PROTECTION FOR POLITICAL CANDIDACY OF PUBLIC EMPLOYEES

*Ross Staine\**

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## I. INTRODUCTION

MODERN elections engender a multitude of challenging constitutional issues due to the complex entanglement of interests possessed by individuals running for office, public employees subject to the control of elected officials, and voters who determine the election's outcome and benefit from the public office assumed by the prevailing candidate. The difficulties associated with these interests are exacerbated when a governmental employee decides to run for an elected office, particularly an elected position within the government body in which he is employed. On one hand, the public employee may be particularly well-qualified to assume the position. He has experience working within the department and knows more intimately the department's efficiencies and ineptitudes. On the other hand, his candidacy could create turmoil, strife, and uncertainty throughout the office in which he works. If the public employee electorally challenges his superior, he simultaneously implies disapproval of that superior's job performance and stakes claim to take over the position. If the incumbent elected official decides not to run for another term, the public employee's political rivals may be coworkers. Other employees within the department may feel involuntarily forced to choose sides; tensions may escalate, tempers may flare, and before long the previously effective government body is inefficiently fulfilling its obligations to the public. To avoid these adverse consequences, elected officials may prefer to take retaliatory action against such political opponents by dismissing or demoting them. In some instances, the retaliation may justifiably protect legitimate government interests. But in other instances, the employer simply hopes to protect his own political prospects or exact a measure of revenge against his rival.

The First Amendment generally protects the rights of individuals, including public employees, to engage in political speech or other political activities.<sup>1</sup> In the absence of accompanying political speech, the contours of the constitutional right to political candidacy remain indeterminate.<sup>2</sup> In its limited precedent pertaining to candidacy, the Supreme Court has only considered state laws that hamper the opportunity of individuals to run for office.<sup>3</sup> In these decisions, the Court habitually invokes the Equal Protection Clause while stressing the constitutional rights of voters rather than the rights of candidates.<sup>4</sup> Never has the Court heard a case alleging an unconstitutional retaliation against a public employee on the basis of candidacy. In contrast, jurisprudence governing the scope of First Amendment protection for freedom of expression and association is well-developed. A detailed methodology exists for determining when public

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1. *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

2. See discussion *infra* Part III.

3. See discussion *infra* Part II-A.

4. See discussion *infra* Part II-A.

employees can be discharged for engaging in First Amendment protected behavior, but the Court has not connected this framework to political candidacy.<sup>5</sup> Consequently, the circuits are badly split regarding the extent, if any, of constitutional protection for candidacy and utilize contradictory methodologies when addressing retaliatory employment actions against public employees for candidacy announcements.<sup>6</sup> One circuit recognizes protection for candidacy,<sup>7</sup> two do not,<sup>8</sup> and three protect candidacy announcements as a form of expression.<sup>9</sup>

Part II of this Comment outlines the Supreme Court's jurisprudence related to the scope of First Amendment protection for candidacy in the context of "ballot access" restrictions on candidates as well as the methodology for determining when the government can constitutionally retaliate against an employee for exercising First Amendment rights. Part III describes the current circuit split with respect to protection for candidacy under the First Amendment. Part IV-A offers an argument that the issues involved in assessing the constitutionality of candidacy dismissals can be distinguished from those relevant to the constitutionality of laws restricting candidacy. Consequently, reliance on Supreme Court opinions that address candidacy restrictions is misplaced. Part IV-B contends that candidacy should be protected by the First Amendment in order to derivatively protect political speech and activity that takes place over the course of a political campaign. Part IV-C contemplates whether a candidacy announcement constitutes expression that touches on matters of public concern. Part IV-D examines the policy ramifications attendant to constitutional protection for candidacy. Finally, Part IV-E addresses the methodology that should be applied when weighing the constitutional interest in candidacy of a public employee against the government's interest in his dismissal.

## II. BACKGROUND

The First Amendment of the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble."<sup>10</sup> The First Amendment also constrains the states by virtue of the Fourteenth Amendment's Due Process Clause.<sup>11</sup> Though not expressly stated in the text of the Constitution, the First Amendment implicitly guarantees freedom of association, which functions as "an indispensable means" of shielding the Constitution's ex-

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5. See discussion *infra* Part II-B.

6. See discussion *infra* Part III.

7. *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010).

8. *Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir. 1997); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977).

9. *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992); *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991).

10. U.S. CONST. amend. I.

11. U.S. CONST. amend. XIV, § 1; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 n.1 (1976).

licit First Amendment guarantees.<sup>12</sup> The First Amendment's guarantees extend to an array of activities related to political campaigns, most notably the speech uttered by candidates.<sup>13</sup> Additionally, the act of casting a ballot in favor of a particular candidate constitutes an exercise of the freedom of association.<sup>14</sup> Accordingly, First Amendment rights of both candidates and voters are exercised during a political campaign and corresponding election.<sup>15</sup> When considering the constitutionality of laws that restrict candidate access to ballots, the Supreme Court has often focused on the rights of voters rather than candidates.<sup>16</sup>

Despite seemingly unconditional language, the guarantees of the First Amendment are not absolute.<sup>17</sup> When an individual accepts employment from the government, his constitutionally guaranteed First Amendment rights may conflict with his employer's need to carry out mandated functions for the benefit of the public.<sup>18</sup> Consequently, the government may find cause to restrict or even eliminate the First Amendment rights of public employees. Alternatively, the government may decide to demote, dismiss, or otherwise punish employees for exercising their First Amendment rights. Recognizing the importance of both individual and government interests and the need to balance the two, the Supreme Court has created multiple frameworks for determining when a government employer can constitutionally make a retaliatory employment decision against an employee for exercising First Amendment rights.<sup>19</sup>

#### A. THE "BALLOT ACCESS" CASES

The Supreme Court has not considered the constitutionality of a public employee's dismissal in retaliation for conducting a political campaign. However, lower courts rely heavily on the "ballot access" cases when expounding the contours of protection for candidacy in the context of a candidacy dismissal.<sup>20</sup> The ballot access cases concern state statutes that restrict the ability of potential candidates to run for public office.<sup>21</sup> Most of these cases have been decided under the Equal Protection Clause as imposing an unconstitutionally discriminatory burden on the rights of voters, rather than on the rights of the candidates themselves.<sup>22</sup> Candidacy restrictions burden voters' freedom of association under the First Amend-

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12. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

13. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted)).

14. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

15. *See id.*

16. *See discussion infra* Part II-A.

17. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

18. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

19. *See discussion infra* Part II-B.

20. *See discussion infra* Part III.

21. *See Clements v. Fashing*, 457 U.S. 957, 959 (1982); *Bullock v. Carter*, 405 U.S. 134, 136–37 (1972); *Williams v. Rhodes*, 393 U.S. 23, 24–26 (1968).

22. *See, e.g., Bullock*, 405 U.S. at 149.

ment because restricting a candidate's access to the ballot imposes a concomitant impediment on the opportunity for voters to associate with that candidate.<sup>23</sup> Because the right to vote "in a free and unimpaired manner is preservative of other basic civil and political rights," voting is recognized as a fundamental right under equal protection.<sup>24</sup>

The Due Process Clause and Equal Protection Clause within the Fourteenth Amendment are closely related and can provide overlapping protection of individual rights.<sup>25</sup> Frequently, government action running afoul of equal protection will also contravene due process.<sup>26</sup> Nevertheless, the differences between the two must be carefully scrutinized in order to appreciate the relationship between the ballot access cases, which are typically resolved under equal protection, and the constitutionality of candidacy dismissals, which must be decided under due process.<sup>27</sup> Due process focuses on the fairness of interaction between the state and individuals whereas equal protection prevents the state from treating similarly situated individuals differently.<sup>28</sup> When a statute is challenged under the Equal Protection Clause, courts will apply one of three standards of review depending on the importance of the individual interests allegedly impaired.<sup>29</sup> If the statute discriminatorily impairs a "fundamental right," a strict scrutiny test is appropriate, requiring that the statute be narrowly tailored to serve a compelling government interest through the least discriminatory means available.<sup>30</sup> If the statute neither impairs a fundamental right nor involves a suspect class, courts apply a more deferential intermediate scrutiny or rational basis standard of review.<sup>31</sup>

The first type of ballot access restriction involves limitations on the opportunities for small political parties or independent candidates to be included on the ballot. In *Williams v. Rhodes*, the Supreme Court invalidated an Ohio statute that placed substantial burdens on the ability of new political parties to place candidates on ballots, "mak[ing] it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties."<sup>32</sup> The majority held that because the state did not provide a sufficiently compelling interest as justification, the statute violated the Equal Protection Clause by discriminatorily infringing upon minority parties' First Amendment right to freedom of association and the right to vote as compared to more well-established parties.<sup>33</sup>

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23. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

24. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

25. 16B AM. JUR. 2D *Constitutional Law* § 830 (2012).

26. See *Williams*, 393 U.S. at 34 (invalidating candidacy restriction under equal protection); *id.* at 41 (Harlan, J., concurring) (arguing that candidacy restriction is invalid under due process rather than equal protection).

27. See, e.g., *Bullock* 405 U.S. at 149.

28. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

29. 16B AM. JUR. 2D *Constitutional Law* § 857.

30. *Id.* The strict scrutiny test is also applied when a "suspect class" is disadvantaged by the statute. *Id.*

31. *Id.*

32. 393 U.S. 23, 24–25, 34 (1968).

33. *Id.* at 31, 34.

Concurring, Justice Harlan would have grounded the decision under the First Amendment as applied through the Due Process Clause.<sup>34</sup> Justice Harlan argued that even though the Ohio statute did not directly restrict political affiliation, it "eliminated the basic incentive" for political parties "to assemble or discuss public issues or solicit new members."<sup>35</sup> Therefore, the statute effectively deprived individuals "of the substance, if not the form" of their right to political affiliation.<sup>36</sup>

On the other hand, the Court has rejected First Amendment and Equal Protection challenges to state statutes where the restrictive provisions are outweighed by a compelling governmental interest.<sup>37</sup> For instance, Texas statutes restricting candidate access to the ballots were upheld when they "in no way fr[oze] the status quo, but implicitly recognize[d] the potential fluidity of American political life" while preserving a "real and essentially equal opportunity for ballot qualification" by smaller political parties.<sup>38</sup>

The Court has also considered the constitutionality of state statutes that compel candidates to pay filing fees in order to be included on the ballot. In *Bullock v. Carter*, the Supreme Court invalidated a Texas statute under equal protection that required candidates to pay filing fees up to \$8,900.<sup>39</sup> In very important language, frequently cited by the circuits as either support for or denial of constitutional protection of candidacy, the Court stated:

The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.<sup>40</sup>

Lower courts dispute whether this language merely rejects candidacy as a *fundamental* right for purposes of requiring strict scrutiny under equal protection or, alternatively, rejects candidacy as constitutionally protected by the First Amendment language.<sup>41</sup> Ultimately, strict scrutiny was still applicable because the system discriminatorily favored the voting interests of the wealthy.<sup>42</sup> The Court found no sufficiently compelling governmental interest to justify the filing fees, particularly considering a complete deficiency of any "reasonable alternative means of access to the ballot."<sup>43</sup>

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34. *Id.* at 41 (Harlan, J., concurring).

35. *Id.*

36. *Id.*

37. *See* *Am. Party of Tex. v. White*, 415 U.S. 767, 780-81 (1974).

38. *Id.* at 787-88.

39. 405 U.S. 134, 145, 149 (1972).

40. *Id.* at 142-43.

41. *See* discussion *infra* Part III.

42. *Bullock*, 405 U.S. at 144.

43. *Id.* at 149.

In a third variant of statutory candidacy restrictions, some states have imposed “resign to run” requirements whereby elected officials occupying certain specified positions are restricted from running for another elected position. In *Clements v. Fashing*, the Court upheld two provisions of the Texas Constitution: the first prohibited elected judges from running for the Texas Legislature prior to the expiration of their terms, while the second, a “resign to run” provision, mandated that specified elected officials would automatically resign from their positions upon announcing candidacy for another elected position.<sup>44</sup> In another bout of language that lower courts cite both to acknowledge and repudiate constitutional protection for a public employee’s candidacy, a plurality of the Court noted: “Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’”<sup>45</sup> The provision imposing a “waiting period” on judges before they could seek candidacy did not violate equal protection because the limitation inflicted only “a *de minimis* burden on the political aspirations of a *current* officeholder” and “[u]nlike filing fees or the level-of-support requirements, . . . in no way burden[ed] access to the political process by those who are outside the ‘mainstream’ of political life.”<sup>46</sup> And since “a waiting period is hardly a significant barrier to candidacy” and merely an “insignificant interference with access to the ballot,” the rational basis test was the appropriate standard of review for equal protection analysis.<sup>47</sup> The resign to run provision imposed an even lesser burden on candidates and had no discriminatory effect, so the Court addressed its constitutionality under a rational basis review as well.<sup>48</sup> Since there was a rational connection between the provisions and compelling government interests, both were upheld by the plurality.<sup>49</sup> A majority of the Court, joined by Justice Stevens, held in the alternative that the provisions did not violate the First Amendment as applied to the states through the Due Process Clause because “[t]he State’s interests . . . are sufficient to warrant the *de minimis* interference with [the candidate’s] interests in candidacy.”<sup>50</sup> The Eleventh Circuit cites this language as its primary basis for recognizing First Amendment protection for candidacy.<sup>51</sup>

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44. 457 U.S. 957, 960, 971–72 (1982).

45. *Id.* at 963 (plurality opinion) (quoting *Bullock*, 405 U.S. at 143); see discussion *infra* Part III.

46. *Clements*, 457 U.S. at 967–68 (plurality opinion).

47. *Id.* (internal quotation marks omitted).

48. *Id.* at 970.

49. *Id.* at 968, 970.

50. *Id.* at 971–72 (majority opinion).

51. See discussion *infra* Part III-B.



## B. METHODOLOGIES GOVERNING FIRST AMENDMENT DISMISSALS OF PUBLIC EMPLOYEES

The government ordinarily cannot constitutionally retaliate against a public employee for engaging in an activity that is protected by the First Amendment.<sup>52</sup> However, there are instances where a public employee's freedom of expression or freedom of association conflicts with his government employer's ability to fulfill its duties to the public.<sup>53</sup> The Supreme Court has developed tests to determine when an employer can make an adverse employment decision against a public employee in response to his exercise of freedom of expression or freedom of association.<sup>54</sup>

### 1. Freedom of Expression Framework

In *Pickering v. Board of Education* and its progeny, the Supreme Court articulated a two-part inquiry to determine whether an adverse employment action violates a public employee's freedom of expression.<sup>55</sup> Retaliation is unconstitutional if (1) the public employee's speech addresses a matter of public concern, and (2) the public employee's individual rights to the speech exceed his government employer's interest in maintaining efficiency in the completion of its duties.<sup>56</sup>

The first prong of so-called *Pickering* analysis, the public concern test, recognizes that speech on private matters "does not implicate the same constitutional concerns" as speech on matters of public concern.<sup>57</sup> Unlike with speech on matters of public concern, restricting speech on private matters poses "no threat to the free and robust debate of public issues; . . . no potential interference with a meaningful dialogue of ideas; and . . . [no] risk of a reaction of self-censorship on matters of public import."<sup>58</sup> While "the boundaries of the public concern test are not well defined" and require examination of "the content, form, and context of [the] speech, as revealed by the whole record," several "guiding principles" have been articulated by the Supreme Court.<sup>59</sup> The public concern test is satisfied when speech "can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."<sup>60</sup> The second prong of analysis, the *Pickering* balancing test, requires a close examination of the speech

52. *Branti v. Finkel*, 445 U.S. 507, 514–15 (1980).

53. See *Elrod v. Burns*, 427 U.S. 347, 367–68 (1976) (plurality opinion); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

54. See *Elrod*, 427 U.S. at 363, 367–68; *Pickering*, 391 U.S. at 568.

55. 391 U.S. at 568; *Connick v. Myers*, 461 U.S. 138, 145–47 (1983).

56. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 147).

57. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

58. *Id.* at 1215–16 (internal quotation marks omitted).

59. *Id.* at 1216 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam)) (internal quotation marks omitted).

60. *Id.* at 1216 (quoting *Connick*, 461 U.S. at 146; *Roe*, 543 U.S. at 83–84).

and its effect.<sup>61</sup> The employee's constitutional interest in speaking on matters of public concern "varies depending [on] the nature of the . . . expression."<sup>62</sup> The government's interest in dismissing the employee also requires a highly fact-intensive analysis of all the circumstances surrounding the speech, the employee's role within the government department, his relationship to superiors and co-workers, and the effect of the speech on the department's operations.<sup>63</sup>

## 2. Policymaker Framework

The Supreme Court developed a related but separate doctrine in response to the previously rampant practice of political patronage, in which elected officials would dismiss public employees exclusively because of their political affiliation.<sup>64</sup> In *Elrod v. Burns*, a sheriff won the election while running on a Democratic ticket and then proceeded to fire a large number of Republican public employees that were subject to his command.<sup>65</sup> The Supreme Court held that an adverse employment decision based on the political affiliation of an employee is only constitutional if it "further[s] some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained . . . outweigh[s] the loss of constitutionally protected rights."<sup>66</sup> The *Elrod* balancing test is satisfied, enabling dismissal based on political affiliation, as to certain employees who qualify as "policymakers" to "insure that policies which the electorate has sanctioned are effectively implemented."<sup>67</sup> The Court rejected arguments that patronage dismissals can be justified in order to improve government effectiveness, increase employee efficiency, or preserve the two-party system.<sup>68</sup> In *Branti v. Finkel*, the Court addressed patronage dismissals again, clarifying that an employee in a particular position is a policymaker if "party affiliation is an appropriate requirement for the effective performance of the public office involved."<sup>69</sup> There is some dispute as to whether *Branti* completely reformulated the *Elrod* balancing test or rather clarified its mode of operation.<sup>70</sup>

## III. CURRENT STATE OF THE LAW

"Precedent in the area of constitutional protection for candidacy can be

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61. *Connick*, 461 U.S. at 150–53.

62. *Id.* at 150.

63. 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:17 (2012).

64. *Elrod v. Burns* 427 U.S. 347, 350–51, 363, 367–68 (1976) (plurality opinion).

65. *Id.* at 350–51.

66. *Id.* at 363.

67. *Id.* at 372.

68. *Id.* at 364–66, 368–69.

69. 445 U.S. 507, 518 (1980).

70. See Christopher V. Fenlon, Note, *The Spoils System in Check? Public Employees' Right to Political Affiliation & the Balkanized Policymaking Exception to § 1983 Liability for Wrongful Termination*, 30 CARDOZO L. REV. 2295, 2310 & n.61 (2009).

best described as a legal morass."<sup>71</sup> A three-way split divides the circuits concerning the existence of and rationale for protection afforded to a public employee who announces candidacy to run for public office. The Sixth and Seventh Circuits hold that announcing candidacy alone does not implicate the First Amendment.<sup>72</sup> Only when the candidate engages in activity during the course of his campaign that independently constitutes speech of a public concern under *Pickering* or political association under *Elrod* will the First Amendment come into play.<sup>73</sup> In direct conflict, the Eleventh Circuit holds that candidacy in and of itself is protected by the First Amendment.<sup>74</sup> The Fifth and Tenth Circuits adopt a compromise position under which the announcement of candidacy is per se speech of public concern that is protected under *Pickering*.<sup>75</sup> The Ninth Circuit apparently recognizes that the announcement of candidacy is a content-based communication protected under the First Amendment.<sup>76</sup>

#### A. THE SIXTH AND SEVENTH CIRCUITS: NO PROTECTION FOR CANDIDACY

The Sixth and Seventh Circuits both decidedly reject any notion that candidacy in and of itself is protected by the First Amendment. In *Carver v. Dennis*, a deputy clerk announced that she would challenge her superior in the upcoming election for county clerk.<sup>77</sup> The incumbent county clerk, displeased with the candidacy announcement, swiftly dismissed the deputy.<sup>78</sup> The Sixth Circuit rejected the applicability of *Elrod*, emphasizing that the deputy clerk was "fired . . . for her rival *candidacy*, . . . [not] for her political beliefs, her expression of those beliefs, or her political affiliations."<sup>79</sup> The court additionally refused to classify the deputy clerk's announcement as speech on a matter of public concern under *Pickering* because she "[n]either held [n]or voiced any opinions."<sup>80</sup> The court then relied on *Bullock* and *Clements*, concluding that the First Amendment provides no guarantee for political candidacy.<sup>81</sup> The Seventh Circuit reached a similar result in *Newcomb v. Brennan*, where an incumbent city attorney dismissed a deputy city attorney following the deputy's decision to run for city attorney.<sup>82</sup> The court quoted *Bullock*'s "no fundamental status to candidacy" language as support for the proposition that an "interest in seeking office, by itself, is not entitled to constitutional

71. *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010).

72. *Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir. 1997); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977).

73. *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007).

74. *Randall*, 610 F.3d at 713.

75. *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Click v. Copeland*, 970 F.2d 106, 111–12 (5th Cir. 1992).

76. *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991).

77. 104 F.3d at 848.

78. *Id.*

79. *Id.* at 850.

80. *Id.* at 852.

81. *Id.* at 852.

82. 558 F.2d 825, 827–28 (7th Cir. 1977).

protection.”<sup>83</sup>

Nevertheless, the Sixth and Seventh Circuits acknowledge that the First Amendment protects a candidate’s campaign activities separate from the mere announcement of candidacy.<sup>84</sup> In the Seventh Circuit, a dismissed public employee must allege that the dismissal resulted from expression or political views “as distinct from the fact of her candidacy.”<sup>85</sup> For instance, the deputy clerk in *Newcomb* argued that his dismissal was an attempt to “discourage [his] candidacy *in particular*,” such that another individual employed in the same position by the same county clerk with different political ideals would not have been dismissed in response to the announcement of candidacy for the position of county clerk.<sup>86</sup> Assuming the deputy clerk’s allegations to be true, his dismissal “represented punishment by the state based on the content of a communicative act.”<sup>87</sup> The First Amendment prohibits content-based restrictions on expression, so the dismissal “implicate[d] interests which are broader than a per se right to candidacy.”<sup>88</sup> Accordingly, the deputy clerk’s dismissal ran afoul of the First Amendment.<sup>89</sup>

The Sixth Circuit explicates a view that “cases involving political speech by public employees proceed on a continuum” and endeavors to distinguish between “the simple announcement of candidacy, which does not trigger protected political speech, and an announcement coupled with speech critical of one’s opponent (and boss), which does trigger constitutional protection.”<sup>90</sup> In *Murphy v. Cockrell*, the Sixth Circuit held that the campaign activities of a deputy employee and candidate for Property Value Administrator (PVA) implicated his freedom of expression.<sup>91</sup> In this instance, the incumbent PVA had abstained from seeking reelection, so the deputy’s political rival was a co-worker.<sup>92</sup> The deputy’s campaign signs attacked his opponent’s ability to perform the job of PVA and condemned his move from the Democratic to Republican party shortly before the election.<sup>93</sup> The court agreed that the deputy’s criticism of his opponent was political speech touching on matters of public concern, accepting the argument that “the ultimate political consideration in any race is who is the better candidate.”<sup>94</sup> Similarly, in *Pierce v. Bennett*, a deputy sheriff spoke on matters of public concern after announcing his

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83. *Id.* at 828.

84. *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007); *Newcomb*, 558 F.2d at 828–29.

85. *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

86. 558 F.2d at 828 (emphasis added).

87. *Id.*

88. *Id.* at 828–29.

89. *Id.* at 829. The Seventh Circuit ultimately ruled in favor of the county clerk after finding the government’s interest in the dismissal to be substantial enough to satisfy a balancing test. *Id.* at 830–31.

90. *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008).

91. 505 F.3d 446, 448, 451 (6th Cir. 2007).

92. *Id.* at 448.

93. *Id.* at 448–49.

94. *Id.* at 452.

candidacy against the incumbent sheriff in an upcoming election.<sup>95</sup> The candidates conducted a “mild and civil” campaign in which the deputy placed advertisements claiming that he would be a “working sheriff” and suggested that his future employees would exhibit analogous “working” attributes.<sup>96</sup> Despite an absence of aggressive campaigning and personal attacks by the deputy against his opponent, the district court had “no difficulty” in concluding that the deputy’s campaign activities spoke on matters of public concern.<sup>97</sup> The campaign advertisements impliedly “criticiz[ed] the current Sheriff, his policies, and the fitness of his deputies.”<sup>98</sup>

The Sixth Circuit’s methodology conspicuously requires an inquiry into the subjective motivation for the public employee’s dismissal.<sup>99</sup> Even when a candidate engages in political speech touching on matters of public concern, his government employer can constitutionally take retaliatory action if he is responding to the fact of candidacy as opposed to the candidate’s political speech.<sup>100</sup> In *Greenwell v. Parsley*, the Sixth Circuit determined that the dismissal of a deputy police officer by the sheriff was not in response to an expression on matters of public concern because there was no evidence that the termination was for reasons other than the deputy’s candidacy.<sup>101</sup> The deputy was discharged immediately following his announcement of candidacy in a local newspaper that was accompanied by remarks pointedly suggesting ways the department could be improved.<sup>102</sup> While the remarks in the newspaper may have spoken to matters of public concern, there was simply no evidence presented by the employee indicating the dismissal was for reasons aside from the candidacy itself.<sup>103</sup> Likewise, in *Murphy*, a dissenting judge disputed whether the facts could be distinguished from *Carver* because he did not believe that the deputy met her burden of proving that the motivation for her dismissal was her critical speech rather than the fact of her candidacy.<sup>104</sup>

While the Sixth Circuit continues to follow *Carver*, several recent opinions within the circuit criticize its logic and outcome.<sup>105</sup> In *Myers v. Dean*, the Sixth Circuit addressed facts that were “nearly identical” to *Carver* and consequently could not be distinguished.<sup>106</sup> The court stressed the absurdity of the *Carver* rule which essentially provides that a public employee “is protected from retaliation for supporting any candidate *other*

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95. 835 F. Supp. 2d 288, 293–94 (W.D. Ky. 2011).

96. *Id.* at 290, 293.

97. *Id.* at 293–94.

98. *Id.* at 293.

99. *See Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008).

100. *Id.*

101. *Id.*

102. *Id.* at 403.

103. *Id.* at 403–04.

104. *Murphy v. Cockrell*, 505 F.3d 446, 456 (6th Cir. 2007) (Guy, J., concurring in part and dissenting in part).

105. *Greenwell*, 541 F.3d at 405 (Martin, J., concurring); *Myers v. Dean*, 216 F. App’x 552, 554 (6th Cir. 2007); *Becton v. Thomas*, 48 F. Supp. 2d 747, 756–57 (W.D. Tenn. 1999).

106. 216 F. App’x at 553–54.

than herself.”<sup>107</sup> In a dissenting opinion, Judge Martin argued that *Bullock*’s holding only concerned whether states must include the names of individuals who want to run for public office on ballots.<sup>108</sup> Judge Martin also construed *Clements* to be “expressly distinguished [from] cases where a civil servant is the candidate.”<sup>109</sup> Consequently, the holding of *Carver* improperly relied on the Supreme Court’s ballot access cases.<sup>110</sup> A district court even discussed the possibility that *Carver*’s holding should be limited to its specific facts involving the dismissal of “an at-will employee in a two-person office” for running against her superior, the only other person in the office.<sup>111</sup>

#### B. THE ELEVENTH CIRCUIT: FIRST AMENDMENT GUARANTEES RIGHT TO CANDIDACY

The Eleventh Circuit adopts the position that candidacy is protected by the First Amendment.<sup>112</sup> In *Randall v. Scott*, a district attorney’s chief of staff announced his intent to seek election to the County Board of Commissioners.<sup>113</sup> The district attorney, whose husband was also seeking election to the Board, fired the staff member.<sup>114</sup> The court first considered the relevant Supreme Court precedent, interpreting *Bullock*’s “no fundamental status to candidacy” language as relevant only to the standard of review to be applied under equal protection.<sup>115</sup> Continuing, the majority argued that *Clements* “suggests that political candidacy is entitled to at least a modicum of constitutional protection.”<sup>116</sup> Moreover, the similarity between “supporting a candidate,” which is protected under *Elrod*, and “being a candidate” reinforces the need to protect candidacy.<sup>117</sup> After also considering its own precedent, the court concluded that candidacy “lies at the core of values protected by the First Amendment.”<sup>118</sup> Accordingly, the chief of staff’s dismissal violated his First Amendment interest in candidacy.<sup>119</sup> Because the Eleventh Circuit interpreted candidacy as a right distinct from expression or association, neither *Pickering* nor *Elrod* analysis governed.<sup>120</sup> Instead, the court articulated a new balancing test whereby the dismissal must be “of sufficient importance to justify the in-

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107. *Id.* at 554. *Elrod* will protect public employees who support *other* political candidates from dismissal so long as they are not policymakers. *Elrod v. Burns*, 427 U.S. 347, 353–54, 363, 386 n.10 (1976) (plurality opinion).

108. *Greenwell*, 541 F.3d at 405 (Martin, J., concurring).

109. *Id.*

110. *Id.*

111. *Becton v. Thomas*, 48 F. Supp. 2d 747, 756–57 (W.D. Tenn. 1999) (quoting *Carver v. Dennis*, 104 F.3d 847, 849 (6th Cir. 1997)).

112. *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010).

113. *Id.* at 703.

114. *Id.* at 704.

115. *Id.* at 711.

116. *Id.* at 711–12. The *Randall* court does not clearly articulate why *Clements* should be read to suggest constitutional protection for candidacy. *See id.*

117. *Randall*, 610 F.3d at 711.

118. *Id.* at 713.

119. *Id.* at 714.

120. *Id.*

fringement of [the public employee's] First Amendment right to run for [public office]."<sup>121</sup> Somewhat confusingly, the court restated the test as requiring that "the state's interest in preventing an individual from running for office" be greater than "the individual's First Amendment right to run."<sup>122</sup> The court refrained from defining the "level of scrutiny" that should be applied to a dismissal based purely on candidacy, holding only that a "decision to run for office enjoys *some* First Amendment protection."<sup>123</sup> Since the chief of staff was fired for personal reasons, and the candidacy did not impair any state interest, the balancing test weighed in favor of the chief of staff such that his dismissal was unconstitutional.<sup>124</sup>

In *Underwood v. Harkins*, the Eleventh Circuit further developed its political candidacy jurisprudence when a recently elected superior court clerk fired her political rival and former co-worker, a deputy clerk, whom she defeated in the Republican primary election before ultimately winning the general election.<sup>125</sup> The Eleventh Circuit rearticulated the contradictory balancing approach outlined in *Randall*, stating that "the appropriate standard for candidacy dismissals" is identical to the "balancing test between a discharged employee's First Amendment right to support a candidate and the state's interest in office loyalty."<sup>126</sup> The court relied on precedent developing the *Elrod* policymaker exception to assess the government's interest in removing a public employee based on candidacy.<sup>127</sup> Because the policymaker exception under *Elrod* "employ[s] a balancing test laced with a form of heightened scrutiny," the court acknowledged that it was also applying a form of heightened scrutiny to candidacy dismissals.<sup>128</sup> The court concluded that the deputy clerk occupied a policymaking position under *Elrod*.<sup>129</sup> Consequently, the deputy clerk's "rights los[t] out under a *Randall* balancing analysis" to the state's interest because a court clerk "must be able to select a deputy in whom she has total trust and confidence and from whom she can expect, without question, undivided loyalty."<sup>130</sup>

### C. THE FIFTH, NINTH, AND TENTH CIRCUITS: CANDIDACY ANNOUNCEMENTS PROTECTED AS FORM OF EXPRESSION

The Fifth and Tenth Circuits hold that an announcement of candidacy

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121. *Id.*

122. *Id.* In the first articulation of the test, the court compares the employee's constitutional rights to the government's need to dismiss him in response to the exercise of constitutional rights. *See id.* In the second articulation of the test, the court compares the employee's constitutional rights to the government's need to *prevent him from exercising his rights*. *See id.*

123. *Id.*

124. *Id.*

125. 698 F.3d 1335, 1337–38 (11th Cir. 2012).

126. *Id.* at 1340.

127. *Id.* at 1342–43.

128. *Id.* at 1343 n.4.

129. *Id.* at 1343.

130. *Id.*

constitutes speech on matters of public concern under *Pickering*.<sup>131</sup> In *Click v. Copeland*, two deputies announced their candidacies to run against their superior, the incumbent sheriff, in the upcoming election.<sup>132</sup> The Fifth Circuit held that their subsequent demotion violated the First Amendment because “[i]t is undisputed that [the deputies’] conduct, running for elected office, addressed matters of public concern.”<sup>133</sup> Applying the *Pickering* balancing test, the demotion was unjustified because there was no evidence that the “political candidacies had any effect on their performance, on others’ performance, on discipline, or on harmony among coworkers.”<sup>134</sup> In *Jantzen v. Hawkins*, an incumbent sheriff immediately dismissed a deputy sheriff after the deputy’s candidacy announcement.<sup>135</sup> Like the Fifth Circuit, the Tenth Circuit determined that announcing candidacy was “political speech” which “undoubtedly relates to matters of public concern.”<sup>136</sup> However, under the *Pickering* balancing test, the dismissal was justified because “when a subordinate runs for office against his or her boss, such a candidacy risks undermining that office’s efficient performance.”<sup>137</sup> The *Jantzen* court also held that the deputy sheriff’s freedom of political affiliation was not implicated, even though he was declaring his candidacy against his boss, because “the right to political affiliation does not encompass the mere right to affiliate with oneself.”<sup>138</sup>

The Fifth Circuit has also held that a public employee’s dismissal can implicate the First Amendment even *prior* to an announcement of candidacy under narrow circumstances where the employee had previously engaged in protected political activities and it was expected that an announcement of candidacy would be forthcoming.<sup>139</sup> In *Jordan v. Ector County*, two co-workers, deputy clerks, ran against each other for the office of district clerk in 2002.<sup>140</sup> After prevailing in the 2002 election, the newly elected district clerk demoted her rival.<sup>141</sup> Three years later, shortly prior to the 2006 election for the same position, the deputy was dismissed.<sup>142</sup> At the time she was fired, the deputy had not announced her candidacy for the 2006 election, though her coworkers generally expected her to run for the position again.<sup>143</sup> The district clerk conceded that part of her reason for dismissing the deputy was that “she thought it

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131. *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992).

132. 970 F.2d at 108.

133. *Id.* at 112.

134. *Id.*

135. 188 F.3d at 1250.

136. *Id.* at 1257.

137. *Id.* at 1258.

138. *Id.* at 1252.

139. *Jordan v. Ector Cnty.*, 516 F.3d 290, 296–98 (5th Cir. 2008).

140. *Id.* at 293.

141. *Id.*

142. *Id.*

143. *Id.*



would be 'easier' to run against a disgruntled former employee."<sup>144</sup> The Fifth Circuit first noted that "an unexpressed intent to run" is not protected without "some outward manifestation" of First Amendment activity.<sup>145</sup> The deputy clerk's 2002 campaign certainly addressed matters of public concern and political affiliation.<sup>146</sup> After concluding that the 2002 campaign implicated the First Amendment, the Fifth Circuit proceeded to address whether the dismissal, if it was a preemptive retaliatory measure in anticipation of the 2006 election, violated the First Amendment.<sup>147</sup> Because "there were signals, however subtle, that [the deputy clerk] continued to be and would be [the district clerk's] political rival," the 2006 election could not be considered in complete isolation from the 2002 campaign.<sup>148</sup> The two clerks remained political opponents, even absent a declaration of candidacy by the deputy.<sup>149</sup> Consequently, the deputy clerk demonstrated "outward signs" of First Amendment protected political affiliation during the period of time leading up to the 2006 election.<sup>150</sup> Because the clerk's political activities did not cause any disruption whatsoever, the balancing test weighed in favor of the deputy clerk.<sup>151</sup>

The Ninth Circuit protects a public employee's candidacy announcement under the theory that "[d]isciplinary action discouraging a candidate's bid for elective office 'represent[s] punishment by the state based on the content of a communicative act.'"<sup>152</sup> Notwithstanding reliance on *Newcomb* for this proposition, the Ninth Circuit employs substantially broader language than its sister circuit.<sup>153</sup> *Newcomb* emphasized that the deputy clerk's dismissal was motivated by the desire to prevent that particular deputy clerk from running for office.<sup>154</sup> The implication is that preventing a specific employee, but not necessarily others with different political ideas and policies, from running for office effectively amounts to an attempt to curb the content only of the dismissed employee's communication.<sup>155</sup> But the Ninth Circuit does not limit its language to situations where a dismissal based on the employee's candidacy, the communicative act, is a response to that particular employee's political views.<sup>156</sup> Instead, the Ninth Circuit's language suggests that discouraging *any candidacy* is per se punishment based on the content of a communicative act.<sup>157</sup>

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144. *Id.*

145. *Id.* at 296-97.

146. *Id.* at 297.

147. *Id.* at 296-98. It was necessary to resolve this issue because the motivation for the dismissal was disputed. *Id.* at 296. The court had to consider whether the dismissal was in response to the 2002 campaign or an anticipated 2006 campaign. *Id.*

148. *Id.* at 297-98.

149. *Id.*

150. *Id.* at 298.

151. *Id.* at 299.

152. *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) (quoting *Newcomb v. Brennan*, 558 F.2d 825, 828-29 (7th Cir. 1977)).

153. *Newcomb*, 558 F.2d at 828-29.

154. *Id.*

155. *See id.*

156. *See Finkelstein*, 924 F.2d at 1453.

157. *See id.*

D. PRONG TWO OF A FIRST AMENDMENT CANDIDACY DISMISSAL:  
THE BALANCING TEST

Irrespective of contradictory attitudes toward candidacy, each circuit will apply some form of balancing test in the event that a public employee's dismissal implicates the First Amendment, be that at the announcement of candidacy or sometime thereafter. Complicating matters is the reality that the scope of *Elrod* and *Pickering* overlap, and quite often a public employee running for political office will be fired for reasons amounting to a combination of his political affiliation and speech on matters of public concern.<sup>158</sup> The circuits are divided concerning the proper interaction between the policymaker exception and *Pickering*.<sup>159</sup> Nevertheless, *Pickering* balancing tends to be the dominant approach applied by courts for a candidacy dismissal unless the court construes the retaliation as exclusively in response to the candidate's political affiliation.<sup>160</sup> The Eleventh Circuit, however, espoused an innovative balancing test, distinct from *Pickering*, when considering *only* the announcement of candidacy.<sup>161</sup> The court relies on *Elrod* policymaker precedent to guide its application.<sup>162</sup> The specific contours of the Eleventh Circuit's test remain uncertain due to inconsistent articulation and limited precedent.<sup>163</sup>

When conducting *Pickering* balancing, courts regularly uphold dismissals of public employees when the government introduces evidence of actual disruption.<sup>164</sup> Lacking actual disruption, the employee can still be dismissed when the circumstances indicate a sufficient likelihood of dis-

158. See *Elrod v. Burns*, 427 U.S. 347, 350–51, 363, 367–68 (1976) (plurality opinion); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

159. *Curinga v. City of Clairton*, 357 F.3d 305, 313 n.8 (3d Cir. 2004). The *Curinga* court describes a three-way circuit split regarding the dismissal of a public employee holding a policymaking position for both speech on public concern and political affiliation. *Id.* The Third, Fifth, Tenth, and Eleventh Circuits apply the *Pickering* balancing test. *Id.* The First, Second, Sixth, and Seventh Circuits hold that a policymaker can be dismissed unconditionally without the need to apply *Pickering* balancing for *political* speech. *Id.* In the Ninth Circuit, a policymaker can be dismissed for *any* speech, whether or not it relates to his political views. *Id.* When the public employee is not a policymaker under *Elrod*, all the Circuits will apply *Pickering*. See *id.*

160. Paul R. Koster, *Election Battles and Their Impact on the Public Employer*, 38 URB. LAW. 1187, 1191 (2006) (reviewing factors considered by courts when applying *Pickering* balancing in the context of candidacy dismissals).

161. *Underwood v. Harkins*, 698 F.3d 1335, 1340 (11th Cir. 2012); *Randall v. Scott*, 610 F.3d 701, 714 (11th Cir. 2010).

162. *Underwood*, 698 F.3d at 1342–43.

163. See *supra* text accompanying notes 120–22, 126–30.

164. See *Newcomb v. Brennan*, 558 F.2d 825, 830–31 (7th Cir. 1977) (“[O]nce an open rift developed between the city attorney and his deputy even if the basis for the feud were unrelated to actual job performance the city attorney’s office could become a battleground in which little was accomplished, to the detriment of the citizens.”); *Pierce v. Bennett*, 835 F. Supp. 2d 288, 297–98 (W.D. Ky. 2011) (holding that government interests exceeded dismissed deputy’s interests when the deputy’s candidacy exacerbated preexisting tensions to the extent that they “actually impeded the functioning of the department”). But see *Murphy v. Cockrell*, 505 F.3d 446, 452–53 (6th Cir. 2007) (holding that deputy clerk’s interest in expressing political views outweighed the “negative impact . . . [of] the deterioration of [their] relationship . . . and the resultant tension in the office”).

ruption.<sup>165</sup> Important factors influencing the probability of disruption include the size of the office, the level of loyalty required from the public employee's position, whether the public employee's political opponent is his boss, and the temporal proximity between the employee's candidacy and his dismissal.<sup>166</sup>

#### IV. ANALYSIS

##### A. DISTINGUISHING THE "BALLOT ACCESS" CASES FROM THE CIRCUMSTANCES UNIQUE TO A CANDIDACY DISMISSAL

As noted, the circuits sharply dispute whether Supreme Court precedent endorses First Amendment protection for candidacy.<sup>167</sup> The Sixth and Seventh Circuits interpret *Bullock's* rejection of a "fundamental status to candidacy as to invoke a rigorous standard of review" to absolutely foreclose upon any First Amendment attachment of a right to candidacy.<sup>168</sup> Yet, the Eleventh Circuit cites the same language and concludes that the First Amendment provides "at least some" protection despite no "*fundamental* status to candidacy."<sup>169</sup> One commentator criticizes the Eleventh Circuit's position as "well intentioned" but only "tenuously grounded in Supreme Court precedent."<sup>170</sup> In this Part, it is argued that Supreme Court precedent is too ambiguous to provide reasonably definitive support for either position.

In light of divergent interpretations, the context of *Bullock* and *Clements* must be closely analyzed. Two interpretations of *Bullock* are reasonable. First, by denying "a fundamental status to candidacy," the Supreme Court may have been stating that for purposes of equal protection analysis, the right to candidacy is not a fundamental right and thus not subject to strict scrutiny analysis.<sup>171</sup> Alternatively, the Supreme Court may have intended to convey that there is no right to candidacy whatsoever, fundamental or otherwise.<sup>172</sup> Since the *Bullock* Court was addressing the standard of review to apply under an equal protection challenge, it goes to reason that the Court was only referring to the status of candidacy as it pertains to equal protection.<sup>173</sup> Had the Court intended its language to unequivocally bar any protection for candidacy under the First

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165. See *Kent v. Martin*, 252 F.3d 1141, 1144 (10th Cir. 2001) (noting that predictions of disruption can justify a dismissal but only when the adverse employment action is taken shortly after the employee's conduct that is likely to lead to disruption).

166. *Koster*, *supra* note 160, at 1191-92.

167. Compare *Randall v. Scott*, 610 F.3d 701, 711-12 (11th Cir. 2010), with *Carver v. Dennis*, 104 F.3d 847, 850-51 (6th Cir. 1997), and *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977).

168. *Newcomb*, 558 F.2d at 828; see *Carver*, 104 F.3d at 850-51.

169. *Randall*, 610 F.3d at 711, 713.

170. Kevin C. Quigley, Comment, *Wading Through the "Morass": The Eleventh Circuit Recognizes a Right to Candidacy in Randall v. Scott*, 52 B.C. L. REV. E-SUPPLEMENT 185, 185 (2011).

171. See *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972).

172. See *id.*

173. See *id.*

Amendment, it would not have so cavalierly used the word “fundamental.”<sup>174</sup> Reliance on *Bullock* to reject First Amendment protection for candidacy takes the Court’s language entirely out of context and is misplaced.<sup>175</sup>

On the other hand, the Eleventh Circuit’s reliance on *Bullock* as support for a right to candidacy is correspondingly dubious.<sup>176</sup> Even if the *Bullock* Court merely rejected candidacy as a fundamental right for purposes of equal protection, the fact that “candidacy is linked to voters’ rights” does not necessarily imply that candidacy is protected by the First Amendment.<sup>177</sup> Despite acknowledging a connection between candidacy, voting, and the First Amendment, the Court hardly compels the conclusion that, by itself, candidacy is protected by the First Amendment.<sup>178</sup> Rather, and more likely, a restriction on candidacy that limits the choices of voters will impair the freedom of association of those voters.<sup>179</sup> *Bullock* acknowledges that “laws . . . affect[ing] candidates always have at least some theoretical, correlative effect on voters.”<sup>180</sup> But even accepting that laws restricting candidacy often intrude upon the First Amendment rights of voters does not mean that candidacy itself is invariably protected.<sup>181</sup> If, for instance, it could be shown that a particular candidacy restriction did not in any way impose upon the First Amendment rights of voters, the Court might conclude that the restriction does not implicate the First Amendment at all.<sup>182</sup> Admittedly a statutory candidacy restriction that does not constitutionally impose upon voters may be inconceivable, as suggested by the Court.<sup>183</sup> However, the nature of a candidacy dismissal is notably distinct from the candidacy restrictions considered in the ballot access cases.<sup>184</sup> Unlike a law restricting candidacy, a candidacy dismissal has no immediate or direct impact on voters because the dismissal itself in no way inhibits the candidate from continuing his campaign and appearing on the ballots of voters.<sup>185</sup> So even accepting that all candidacy restrictions burden the rights of voters, candidacy dismissals do not necessarily elicit the same causal effect.<sup>186</sup> Consequently, *Bullock*’s close focus on the rights of voters distinguishes it from a candidacy dismissal where the rights of voters are not automatically subject to any immediate risk.<sup>187</sup> And the *Bullock* Court certainly does not mandate constitutional protec-

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174. See *id.*

175. See *id.*

176. See *Randall v. Scott*, 610 F.3d 701, 711 (11th Cir. 2010).

177. See *id.* (citing *Bullock*, 405 U.S. at 142–43).

178. See *Bullock*, 405 U.S. at 142–43.

179. See *id.* at 142–44.

180. *Id.* at 143.

181. See *id.*

182. See *id.*

183. See *id.*

184. See, e.g., *id.* at 142–43, 145.

185. See *id.* at 142–43.

186. See *id.*

187. See *id.*

tion for candidacy without a corresponding deprivation to voters.<sup>188</sup>

The Eleventh Circuit latches onto an additional quotation from *Clements* in support of a right to candidacy that similarly ignores the distinction between laws restricting candidacy and candidacy dismissals.<sup>189</sup> The *Clements* Court upheld the candidacy restriction because it imposed only a “*de minimis* interference” with “First Amendment interests in candidacy.”<sup>190</sup> Out of context, referring to “First Amendment interests in candidacy” could fairly straightforwardly be interpreted as an acknowledgement that there are in fact First Amendment interests in candidacy.<sup>191</sup> However, the language need not be construed so broadly. Rather, the “First Amendment interests in candidacy” referred to by the Court are best interpreted as the interests of *voters* upon which the candidacy restriction intruded.<sup>192</sup>

Other courts have further elaborated upon the significance of the *Clements* plurality’s declaration that “far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’”<sup>193</sup> The Kentucky Supreme Court constructed a novel argument in opposition to a right of candidacy, arguing that the use of “far from” is synonymous with “of a distinctly different and especially opposite quality than.”<sup>194</sup> Further, because “the ‘especially opposite quality’ of a fundamental right is ‘no right at all,’” the court reasoned that “a sound—and perhaps the better—parsing of *Bullocks* and *Clements* is that there is no constitutional right at all to candidacy.”<sup>195</sup> Notwithstanding the *Cook* court’s view, the “especially opposite quality of a fundamental right” is *not* “no right at all” but rather no *fundamental* right at all.<sup>196</sup> A “fundamental right” is a term of art that governs whether to employ a heightened standard of review under equal protection analysis.<sup>197</sup> In other words, “far from” does not modify the existence of a constitutional right to candidacy; instead, “far from” modifies the constitutional status of candidacy as *fundamental* and thereby necessitating a strict scrutiny standard of review.<sup>198</sup> Like the language in *Bullock* referencing fundamental rights, the similar language in *Clements* is equally ambiguous and unhelpful for determining the status of candidacy under the First Amendment.<sup>199</sup>

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188. *See id.*

189. *See* Randall v. Scott, 610 F.3d 701, 711–12 (11th Cir. 2010).

190. *Clements v. Fashing*, 457 U.S. 957, 971–72 (1982).

191. *See id.*

192. *See id.*

193. *Id.* at 963 (plurality opinion) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *see* Randall v. Scott, 610 F.3d 701, 711–12 (11th Cir. 2010); *Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977).

194. *Cook v. Popplewell*, 394 S.W.3d 323, 331–32 (Ky. 2011).

195. *Id.* at 332.

196. *See id.*

197. 16B AM. JUR. 2D *Constitutional Law* § 863 (2012).

198. *See* *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion).

199. *See id.*; *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972).

On the whole, Supreme Court precedent concerning a right to candidacy is simply not clear enough to make any concrete determinations. The Court primarily grounded its examination of candidacy restrictions on the constitutional rights of voters under the Equal Protection Clause. Conversely, candidacy dismissals do not necessarily implicate the rights of voters and require analysis under the Due Process Clause. Consequently, reliance on the ballot access cases to ascertain the constitutional status of candidacy in the context of candidacy dismissals is improper.

B. FIRST AMENDMENT PROTECTION FOR CANDIDACY AS A MEANS  
TO DERIVATIVELY PRESERVE RELATED  
FIRST AMENDMENT RIGHTS

A right to candidacy should be protected by the First Amendment in order to preserve the *eventual exercise* of core First Amendment rights, both the rights of candidates and those of voters, during the course of a campaign and election. Assume for the moment that the act of announcing candidacy, with nothing more, amounts to neither an exercise of the candidate's freedom of speech nor association. In other words, assume that a candidacy announcement is completely neutral with respect to unambiguously recognized First Amendment rights. If this were the case, government employers would have unfettered discretion to retaliate against public employees who announce candidacy. But consider the secondary effects on the First Amendment's guarantees flowing from a candidacy dismissal. Admittedly, the public employee's demotion or dismissal would not require him to withdraw his candidacy. Nor would the candidate be restricted in exercising his freedom of expression and affiliation during his political campaign if he persists in his quest for public office. Assuming he does not withdraw, the general public would have the same opportunity to engage in political dialogue regarding his credentials and policies. And the choices of voters would not be limited; correspondingly, their freedom of political affiliation, exercised by voting, would not be impaired. Arguably, the employee's dismissal could even have the effect of motivating him to remain in the race. Thus, at first glance, a candidacy dismissal is distinguishable from the candidacy restrictions in the ballot access cases, which necessarily produced some level of burden on voters.<sup>200</sup> But considered on a broader scale, the effects of a candidacy dismissal are substantially more ruinous. Fear of retaliation for announcing candidacy can fairly be assumed to discourage public employees from seeking public office or announcing candidacy. And reducing the number of public employees running for office would deprive potential candidates of the platform from which to voice their political views, political parties of the potential individuals with whom they could rally around, the general public of the opportunity to engage in political dialogue facilitated by the would-be candidate's views, and vot-

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200. See *supra* text accompanying notes 176–87.

ers of the ability to affiliate with the candidate of their choice by casting a vote in his favor. Accordingly, the long-term practical consequences of a system permitting candidacy dismissals would noticeably burden undisputed First Amendment rights even if they do not pose analogous effects immediately and in every instance.

In addition, recognizing an interest in candidacy would further the chief purpose of the First Amendment, which is to preserve the political processes essential to democracy.<sup>201</sup> The Supreme Court describes a "close connection between our Nation's commitment to self-government and . . . the First Amendment" and frequently reinforces the crucial importance of preserving First Amendment protections in the context of politics.<sup>202</sup> Candidacy furthers this objective of the First Amendment by derivatively preserving the eventual exercise of freedom of expression and association, which in turn are preservative of democracy. To deny constitutional protection for candidacy and allow unrestrained candidacy dismissals is to curb political speech, repress political processes, and discourage political involvement. Additionally, candidacy itself is an indispensable touchstone of paramount importance in our democratic system in which citizens elect their representatives. Without candidates, a representative democracy by definition cannot exist. Undoubtedly, however, the relationship between candidacy and the derivative effects on the First Amendment rights of others is moderately attenuated. As a result, the level of constitutional protection afforded to candidacy when weighed against competing interests should be relatively modest, but certainly not non-existent.

Justice Brennan's view of the First Amendment further supports recognition of First Amendment protection for candidacy as a means to derivatively guarantee other rights. Justice Brennan explains:

[The First Amendment] has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.<sup>203</sup>

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201. See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

202. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (citing *Brown v. Hartlage*, 456 U.S. 45, 52 (1982); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Patterson v. Colorado ex rel. Att'y Gen. of Colorado*, 205 U.S. 454, 465 (1907) (Harlan, J., concurring)).

203. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring) (citations omitted) (internal quotation marks omitted).

Stated differently, Justice Brennan believed that the First Amendment “protects the *structure* of communications necessary for the existence of our democracy.”<sup>204</sup> Thus, “[t]he press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news.”<sup>205</sup> Analogizing, candidates should be shielded not only when fully engaged in a political campaign, but also when taking the necessary antecedent action of announcing candidacy.<sup>206</sup> Justice Brennan acknowledged that under a structural model of the First Amendment, “the stretch of [ ] protection is theoretically endless” because even the slightest “imposition of any kind on the press will in some measure affect its ability to perform protected functions.”<sup>207</sup> Therefore, the constitutionality of impositions on the underlying ability of the press to perform its function depends on a balancing of the constitutional interests at risk and the benefit to society coinciding with the imposition.<sup>208</sup> Likewise, the constitutionality of a candidacy dismissal should depend on a balancing of interests.<sup>209</sup> Justice Brennan reinforces the validity of his theory by noting that other constitutional guarantees, including the right to freedom of association, derive from the need to protect more explicit constitutional guarantees.<sup>210</sup>

#### C. CANDIDACY ANNOUNCEMENTS AS SPEECH ON MATTERS OF PUBLIC CONCERN

Even if the First Amendment does not confer a right to candidacy on its own, the *Pickering* framework should protect the announcement of candidacy as a form of expression on matters of public concern.<sup>211</sup> While courts must consider all the circumstances surrounding the speech to determine whether it addresses matters of public concern, the announcement of political candidacy patently implicates “matter[s] of political, social, or other concern to the community” as required under *Connick* and its progeny.<sup>212</sup> The Sixth Circuit, however, holds that the announcement of candidacy is neither political speech nor deserving of First Amendment protection.<sup>213</sup> The Sixth Circuit essentially relies on the premise that when an individual runs for office, the general public will interpret his actions as singularly an indulgence of his own interests without concern for the welfare of the citizens he would serve if elected.<sup>214</sup> Under

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204. Justice William J. Brennan, Jr., Address at the Dedication of the S. I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173, 176.

205. *Id.* at 177.

206. *See id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 n.4 (Brennan, J., concurring).

211. *See Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992).

212. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

213. *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008).

214. *See id.*



a more realistic and less cynical view of democracy, a candidacy announcement conveys to the community that the policies, goals, and ideas of the candidate should be applied to better the office which serves the citizenry *whether or not he is elected*. Even the mere announcement of candidacy, without more, implicitly communicates to the world that the other candidate's policies are inferior to his own and should not be adopted. On the other hand, it could be argued that a candidacy announcement alone does not address matters of public concern if the candidate has not actually made his policies, beliefs, and ideas known to the public.

But consider a scenario where two individuals decide to run for public office and announce their candidacies, but refrain from having any additional outside contact with the world until after the election. Unless the two individuals lived in caves, completely isolated from outside contact, the press would investigate and report on their past, friends (or adversaries) would comment to others about their good and bad characteristics, and voters would draw conclusions as to who is best fit to serve the community. In other words, the public's reaction to a candidacy announcement evidences its paramount importance to a community even before the candidate communicates any policies, beliefs, or ideas to the electorate. Moreover, the announcement generates the very type of public debate, indispensable to democracy, that protection for speech on matters of public concern is designed to promote.<sup>215</sup> Consider Keith Judd, otherwise known as "Prisoner Number 11593-051," who despite serving a seventeen-year sentence in federal prison, which precluded his ability to actively campaign, decided to run against incumbent President Obama in the 2012 West Virginia Democratic primary.<sup>216</sup> As President Obama's sole challenger in West Virginia, Judd won a majority in ten counties and garnered forty percent of the overall vote.<sup>217</sup> The results of the primary election speak for themselves: Keith Judd conveyed a message merely through his candidacy that he, a convicted felon, would serve West Virginians better than the incumbent President Obama.<sup>218</sup> Surely Keith Judd's candidacy amounted to an expression on matters of public concern.<sup>219</sup>

When a public employee announces candidacy against his boss, courts should have an even simpler task of determining that the announcement

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215. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government." (citations omitted) (internal quotation marks omitted)).

216. Mackenzie Weinger, *10 Facts About Felon Keith Judd*, POLITICO (May 9, 2012), <http://www.politico.com/news/stories/0512/76098.html>.

217. Byron Tau, *Felon Beats Obama in Ten West Virginia Counties*, POLITICO (May 8, 2010), <http://www.politico.com/politico44/2012/05/felon-beats-obama-in-several-west-virginia-counties-122863.html>.

218. See *id.*

219. See *Connick v. Myers*, 461 U.S. 138, 146 (1983); Tau, *supra* note 217.

addresses matters of public concern. Nonetheless, the Sixth Circuit persists in its assertion that the “announcement of candidacy [against a superior] is nothing more than the assertion of rival candidacy,” which does not implicate the First Amendment.<sup>220</sup> Contrary to the Sixth Circuit’s view, when a public employee announces candidacy against his boss, he implicitly conveys disapproval of the policies and abilities of the current regime.<sup>221</sup> Given the employee’s close knowledge of the operations of his boss’s department, the implied disapproval is going to carry even greater weight than if he were challenging someone else. And improving the effectiveness or efficiency of a government department, responsible for the distribution of services intended for the public benefit, is clearly a matter of public concern. This is not to say that a superior would be powerless to dismiss an employee who challenges him in an election. The employee’s actions in opposing his superior amount to insubordination, likely creating an actual disruption in the office, and at a minimum spawning a considerable probability that disruption will result.<sup>222</sup> The government is under no obligation to keep a “viper in the nest” and will have a legitimate interest in dismissing the employee.<sup>223</sup> But these are concerns that are addressed in the *Pickering* balancing test and are irrelevant to whether the employee’s announcement of candidacy addresses matters of public concern.<sup>224</sup>

#### D. POLICY IMPACT OF A RIGHT TO CANDIDACY

Protecting candidacy and preventing candidacy dismissals also foster valuable policy objectives. First, protecting candidacy would promote engagement in the political process. In particular, it would enable public employees to run for public office without fear of retaliation. Granted, any public employee who seeks public office could still be dismissed if her constitutional interests were outweighed by legitimate governmental interests.<sup>225</sup> Under the current methodology adopted by the Sixth Circuit, an employer who receives notice that a public employee is running for office is incentivized to *immediately* fire him.<sup>226</sup> If the employee is fired immediately after announcing his candidacy, no First Amendment rights will be implicated whatsoever.<sup>227</sup> If the employer were instead to wait until the individual began actively campaigning, thereby exercising his freedom of expression or association, then the employer would only be

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220. *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008).

221. *See id.*

222. *See Bart v. Telford*, 677 F.2d 622, 624–25 (6th Cir. 1982) (“Discipline is impossible to maintain when a subordinate is running for a position in which he would be the boss of his present superiors.”).

223. *See Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir. 1997).

224. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (describing the *Pickering* test for the constitutionality of dismissals implicating the First Amendment as a *two-part* inquiry: the public-concern test followed by a balancing test).

225. *See Underwood v. Harkins*, 698 F.3d 1335, 1340 (11th Cir. 2012).

226. *See Murphy v. Cockrell*, 505 F.3d 446, 451–52 (6th Cir. 2007).

227. *Id.*

able to constitutionally fire the employee if the *Pickering* or *Elrod* balancing test is satisfied in his favor.<sup>228</sup> Moreover, protecting a candidacy announcement would obviate the necessity of considering the motivation for a candidate's dismissal, a necessary element of the Sixth Circuit's approach.<sup>229</sup>

Additionally, recognizing some form of protection for candidacy would promote ethical campaigning and discourage personal attacks and other inappropriate behavior that might lead to dissension at the public office. When a public employee knows that he can conduct a political campaign, secure in the knowledge that the First Amendment protects him from a retaliatory dismissal *unless his campaign activities create some form of disturbance in the workplace*, the public employee will feel a strong incentive to not engage in behavior that will create workplace disturbances. Under many circumstances, particularly when the employee is challenging his superior, the announcement of candidacy would still create a substantial likelihood of disruption, enabling an immediate and constitutional dismissal.<sup>230</sup> But if the employee challenges a coworker who could not retaliate until after the election or a superior who does not immediately fire him, he can ensure his job security by abstaining from any potentially disruptive behavior.

Paradoxically, the Sixth Circuit appears to adopt an extreme view of candidacy, providing protection *exclusively* when the candidate's campaign becomes critical of his opponent.<sup>231</sup> Though negative political campaigning is protected by the First Amendment, there is no reason to protect *only* negative campaigning without providing parallel protection for campaigns conducted civilly. The Sixth Circuit's approach fails to recognize *any* constitutional protection for candidacy until campaign dialogue adopts undertones that will virtually guarantee disruption.<sup>232</sup> Consider a candidate who challenges a coworker. If the candidate conducts a courteous campaign refraining from any criticism of his opponent and loses, he can be dismissed by his victorious coworker because candidacy alone affords him no protection. But if the candidate disparages his coworker throughout the election and loses, he similarly can be dismissed because his behavior would inevitably have caused a substantial disruption. In essence, the candidate must carefully conduct his campaign in a manner that criticizes his opponent enough to invoke the First Amendment but not so much as to create a disruption. Application of the Sixth Circuit's rule undoubtedly produces unreasonable and undesired results.<sup>233</sup> At an absolute minimum, the Sixth Circuit should not require a candidate's campaign speech to criticize his opponent in order to consti-

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228. *Id.*

229. *See supra* text accompanying notes 99–104.

230. *See supra* text accompanying notes 164–66.

231. *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008).

232. *See id.*

233. *See id.*

tute speech on matters of public concern.<sup>234</sup>

E. SHORTCOMINGS OF THE BALANCING TEST APPLIED BY THE ELEVENTH CIRCUIT FOR CANDIDACY DISMISSALS

If a First Amendment right to candidacy exists, a balancing test must be applied when a public employee suffers an adverse employment decision in retaliation for exercising those rights. If announcing candidacy is regarded as an expression on matters of public concern, the current *Pickering* balancing test would remain appropriate.<sup>235</sup> If, however, the right to candidacy were protected separately, as its own First Amendment guarantee, a new balancing test would need to be formulated. The Eleventh Circuit attempted to create a new balancing test for candidacy, but failed to articulate it clearly.<sup>236</sup> In one formulation of the test, The Eleventh Circuit asserts that courts should compare “the state’s interest in preventing an individual from running for office to the individual’s First Amendment right to run.”<sup>237</sup> This test closely resembles Justice Scalia’s proposed articulation of *Pickering*’s balancing test in a dissenting opinion: “whether [the elected official’s] interest in preventing the expression of such statements in his agency outweighed [the employee’s] First Amendment interest in making the statement.”<sup>238</sup> While acknowledging the need to give government employers some deference for reasonably predicting future harm caused by an employee’s exercise of speech rights, a majority of the Supreme Court has never recognized Justice Scalia’s extremely pro-employer articulation of the test, which focuses exclusively on any *anticipated* disruption resulting from the speech at the time it is made rather than any *actual* disruption which eventually occurred, expected or not.<sup>239</sup>

In a more recent opinion, the Eleventh Circuit framed the balancing test as a comparison of the employee’s First Amendment rights and the “state’s interest in office loyalty,” with precedent developing the policymaker exception as highly persuasive in the outcome.<sup>240</sup> In essence, the *Underwood* court argues that *Elrod*’s policymaker calculus should govern candidacy dismissals.<sup>241</sup> However, the right to candidacy, whether it is viewed as speech on public concern or a separately protected right, should not merit the same level of constitutional protection as guaranteed for political affiliation under *Elrod*.<sup>242</sup> Accepting that candidacy is constitutionally imperative, its real value lies in derivatively fostering the political process, a right far more attenuated than a public employee’s right to

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234. See *id.*

235. See *Jantzen v. Hawkins*, 188 F.3d 1247, 1257–58 (10th Cir. 1999); *Click v. Cope-land*, 970 F.2d 106, 112 (5th Cir. 1992).

236. See *supra* text accompanying notes 120–22, 126–30.

237. *Randall v. Scott*, 610 F.3d 701, 714 (11th Cir. 2010).

238. *Rankin v. McPherson*, 483 U.S. 378, 398–99 (1987) (Scalia, J., dissenting).

239. See *id.*

240. *Underwood v. Harkins*, 698 F.3d 1335, 1340 (11th Cir. 2012).

241. See *id.*

242. See *id.*

political affiliation.<sup>243</sup> Consequently, precedent developing *Elrod* is relevant to determining the constitutionality of a candidacy dismissal, but less weight should be given to the individual's interest in candidacy when applying the calculus.<sup>244</sup> Thus, flaws exist under both incongruous formulations of the Eleventh Circuit's balancing tests, and refinement is warranted.

## V. CONCLUSION

The lower courts remain divided concerning the constitutional status of candidacy in the context of dismissals of public employees who announce their candidacy for public office. The circuits rely heavily on Supreme Court precedent addressing laws that restrict candidate access to the ballots and reach strikingly contradictory conclusions despite citing identical language. When scrutinized, the Supreme Court's ballot access cases are too ambiguous to ascertain the Court's position on the constitutionality of candidacy dismissals. Nevertheless, candidacy should be protected in order to derivatively preserve political speech and affiliation that inevitably flow from an individual's candidacy. The First Amendment's primary purpose is to protect democratic political processes, and it is imperative that candidacy be protected to safeguard against the erosion of democracy. Even if candidacy itself were not protected under the First Amendment, the act of announcing candidacy should constitute speech touching on matters of public concern, protected under the First Amendment subject to *Pickering* analysis. Failure to recognize protection for candidacy under the First Amendment, either as a protected right by itself or as a form of protected expression, would discourage public employees from running for public office and encourage negative and derogatory attacks during campaigns. Finally, the Eleventh Circuit, though commendable for recognizing a right to candidacy, has articulated a flawed balancing approach which needs to be clarified.

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243. See *id.*; *supra* text accompanying notes 201–03.

244. See *Underwood*, 698 F.3d at 1340.

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